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Supreme Court, U.S.
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No. _____

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

KATHERINE GEORGE, individually and
as next friend and natural guardian of
Michael, Karen and Kevin George, minors,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the so-called *Feres* doctrine immunity [*Feres v. United States*, 340 U.S. 135 (1950)] bar a Federal Tort Claims Act action if the service member's injury occurred while he was on furlough?

2. Contrary to this Court's decision in *United States v. Brown*, 348 U.S. 110 (1954), does the mere fact that an individual received treatment at a military hospital as a benefit of his military service automatically trigger the *Feres* doctrine regardless of whether the individual was discharged or on furlough at the time of injury?

3. As Justice Scalia and three other Justices forcefully argued in *United States v. Johnson*, 481 U.S. 681 (1987), should the *Feres* doctrine finally be repudiated?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

KATHERINE GEORGE, individually and
as next friend and natural guardian of
Michael, Karen and Kevin George, minors,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Katherine George, individually and as next friend and natural guardian of Michael, Karen and Kevin George, minors, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Judgment (affirming the judgment below based upon an unpublished Memorandum) was filed and entered by the Ninth Circuit on July 20, 1997. (App., *infra*, 1a-1d). The Order of the Arizona district court, filed on June 18, 1996 (App., *infra*, 2a-2f), was not reported. Judgment was filed in the district court the same day. (App., *infra.*, 2g.)

JURISDICTION

The court of appeals filed and entered its judgment on July 20, 1997 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 et seq., waives sovereign immunity for the tortious

conduct of United States Government employees. It renders the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. On its face, the FTCA does not exempt the military.

The judiciary has carved out an exception to the FTCA referred to as the so-called *Feres* doctrine (derived from this Court's decision in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153 (1950), to prevent interference with military matters when soldiers are injured or killed in activities "incident to" their military service.[1]

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[1] As discussed in detail below, Justice Scalia (joined by three other justices) stated in his dissent in *U.S. v. Johnson*, 481 U.S. 681, 692, 107 S.Ct. 2063, 2070 (1987), that Congress never intended to preclude suits brought by servicemen from the FTCA: "`[i]t would be absurd to believe that Congress did not have the servicemen in mind' in passing the FTCA." (481 U.S. at 693, 107 S.Ct. at 2070, quoting *Brooks v. United States*, 337 U.S. 49, 51, 69 S.Ct. 918, 919 (1949).

STATEMENT

The widow and minor children of Sergeant James George sued the United States Government under the FTCA to recover for the medical malpractice that resulted in George's unnecessary death. The death occurred while George was on a 20 day furlough from his military duties to search for housing and a job in anticipation of his impending retirement from military service. During that period, George injured his knee in an accident at home. He was then treated, and died, at the military hospital located on his base.

The district court granted the Government's motion to dismiss the action under Rule 12(b)(1) of the Federal Rules of Civil Procedure for want of subject matter jurisdiction. The district court concluded that the action was barred by the *Feres* doctrine "[r]egardless of whether Sgt. George was on furlough or not . . . ." (App., *infra*,

2d, lns. 10-11.)

The court of appeals affirmed the judgment of the district court without affording the parties an opportunity to present oral argument, and without mentioning that Sgt. George was on furlough when the alleged medical malpractice occurred.

A. Pertinent Facts.

The medical malpractice that gives rise to this action occurred on or about March 24, 1993. At the time in question, Sgt. George was on a 20 day authorized leave from his military duties for the purpose of house and job hunting in anticipation of his impending retirement. While on that furlough,[2] George injured his knee at his home and

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[2] Although this Court's prior decisions have used the generic word "furlough", that specific term does not appear anywhere in the Army regulations governing leave policies. Therefore, the term must be given an ordinary, common sense meaning. Plaintiff contends that if the term "furlough", as used in the *Feres* doctrine, is to have any real meaning, it would have to encompass Sgt. George's pre-approved

was treated at Fort Bliss Military Hospital, Fort Huachuca, Arizona. Plaintiff alleges Sgt. George subsequently died from the negligence which occurred during his treatment at Fort Bliss Hospital.

B. Proceedings Below.

On November 9, 1995, plaintiff filed her FTCA complaint against the United States Government to recover damages for the death of her husband as a result of the negligent treatment Sgt. George had received while a patient at the Fort Bliss Hospital. Thereafter, based on the *Feres* doctrine, the Government brought a motion to dismiss the complaint for want of subject matter

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and authorized 20-day absence to perform purely personal business. Below, the Government argued, but failed to establish, that Sgt. George's leave did not amount to a furlough for purposes of the *Feres* doctrine. The district court never reached the issue. Instead, it concluded that plaintiff's action was barred "[r]egardless of whether Sgt. George was on furlough or not . . . ." (App., *infra*, 2d, lns. 10-11.)

jurisdiction.

Without entertaining oral argument, the district court, on June 18, 1996, filed a written order granting the motion to dismiss and entered Judgment thereon (App., *infra*., 2a-2g). While recognizing the FTCA on its face does not exempt the military (App., *infra*, 2a), the court concluded that "[r]egardless of whether George was on furlough or not" . . . "the inequity of *Feres* applies and the Government is immune from any liability, no matter how grievous its conduct." (App., *infra*, 2d-2e, emphasis added.)

Without allowing oral argument, the Ninth Circuit affirmed, concluding that: (1) since Sgt. George was on active duty and had not been discharged from the Army, and (2) because "he was treated at an army hospital solely by virtue of his status as a serviceman", "his injuries were incident to military service" and the suit was thus barred

by the *Feres* doctrine. (App., *infra*, 1b-c.) The Ninth Circuit did not address the fact that Sgt. George was on furlough at the time of the alleged malpractice. Nor did it address the direct conflict between the line of circuit court decisions it relied on, as opposed to the Court's holding in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954.)

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit's decision directly conflicts with an unbroken line of Supreme Court authority which recognizes that the *Feres* decision, by its express terms, only applies to service members who are "on active duty and not on furlough." *Feres v. United States*. 340 U.S. 135, 138, 71 S.Ct. 153, 155 (1950) (emphasis added.)

In its earlier decision, *Brooks v. United States*, 337 U.S. 49, 51, 69 S.Ct. 918, 919 (1949), this Court had made

clear that the FTCA's waiver of sovereign immunity included claims against the Government by servicemen. *Brooks, supra*, 337 U.S. at 51, 69 S.Ct. at 919 [allowing tort recovery by soldiers injured on a public highway in their automobile by negligently driven Army truck].

A year later, this Court carved out an exception to this general rule. In *Feres, supra,* this Court concluded that the Government is not liable under the FTCA for injuries to servicemembers "where the injuries arise out of or are in the course of activity incident to service". (*Id.* at 146, 71 S.Ct. at 159.) In creating this exception, however, this Court emphasized the vital distinction between the facts in *Feres* and in *Brooks*:

> "The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and

on no military mission."

Feres, *supra*, 340 U.S. at 146, 71 S.Ct. at 159 (emphasis added.)

Petitioners submit that *Brooks*, rather than *Feres*, applies here, since, as in *Brooks*, Sgt. George was "on furlough", "under compulsion of no orders or duty, and "on no military mission."

2. The circuit courts are confused as to when to apply the *Feres* doctrine. Some circuits have continuously expanded the application of the *Feres* doctrine to apply to virtually every case where the military is in any way involved.[3]

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[3] For example, the Ninth Circuit has often concluded that treatment at a military hospital by virtue of one's status as a serviceman automatically invokes the bar of the *Feres* doctrine. (See, e.g., opinion below (App., infra, 1b-c), citing *Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991). Other circuits have reached different conclusions. (See, e.g., *Cortez v. United States*, 854 F.2d 723, 727 (5th Cir. 1988) [*Feres* bar found unwarranted despite fact that at the time of serviceman's death due to medical malpractice he was on

The Ninth Circuit's conclusion here flies in the face of this Court's decision in *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954.) There, this Court firmly held that: (1) furlough and discharge status are interchangeable for *Feres* doctrine purposes; and (2) a soldier who suffered medical malpractice while being treated at a military hospital was not barred by the *Feres* doctrine if the soldier was on discharge status. That case remains good law and cannot be reconciled with the ruling in the present case, or with the recent circuit court authority cited above.

3. Finally, this case affords this Court the opportunity to overrule *Feres* altogether. As Justice Scalia, joined by three other justices, noted in his dissent in

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the Temporary Disability Retirement List, was receiving disability pay, and was eligible for treatment in a government hospital.]).

United States v. Johnson, 481 U.S. 681, 107 S.Ct. 2063 (1987), *Feres* was a mistake from its beginning to its confused present state of development. (*Id.* at 692-703, 107 S.Ct. at 2070-75 (Scalia, J. dissenting). Justice Scalia's opinion made clear that limiting *Feres* was only a first step toward the hoped-for elimination of a doctrine flawed from start to finish: "[C]ongress not only failed to provide such an exemption, but quite plainly excluded it." (*Id.*)

This Court decided *Johnson* by a narrow 5-4 vote. Four justices stated their firm belief that the *Feres* case had been "wrongly decided and heartily deserves the `widespread, almost universal criticism it has received.'" (*Id.* at 700, 107 S.Ct. at 2074) (Scalia, J. dissenting.) Nothing in the past decade has changed that conclusion and this Court ought finally to acknowledge the illogic and inequity of the *Feres* doctrine and stop it from causing

further suffering.

I. The Court Of Appeals' Application Of The *Feres* Doctrine Conflicts With Long-Established Supreme Court Authority.

The first time this Court addressed the FTCA in a military context, it made clear that the Act's waiver of sovereign immunity included claims against the Government by servicemen. (*Brooks, supra*, 337 U.S. at 51, 69 S.Ct. at 919.) Nonetheless, in its subsequent decision in *Feres, supra*, 340 U.S. 135, 71 S.Ct. 153, this Court held that the Government is not liable under the FTCA for injuries to service members "where the injuries arise out of or are in the course of activity incident to service." (*Id.* at 146, 71 S.Ct. at 159, emphasis added.) The putative claimants in the three consolidated cases

collectively known as "the *Feres* case" included a soldier who perished when fire swept his military barracks, and two soldiers on active duty who were injured by medical malpractice performed by Army doctors. (*Id.* at 137, 71 S.Ct. at 155.) Unlike the facts faced by this Court in *Brooks*, "[t]he common fact underlying the three cases is that each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." (*Id.* at 138, 71 S.Ct. at 155, emphasis added.)

In *United States v. Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954), this Court reaffirmed the basic polarity between *Brooks* (on furlough/tort suit permitted) and *Feres* (injured while on active duty and not on furlough/tort suit barred.) *Brown* concerned an action brought by a discharged veteran alleging medical malpractice by doctors at a veterans hospital. Although the soldier's original

injury was received while he was on active duty, the alleged malpractice occurred after his discharge. (*Id.*) Given those facts, this Court held the malpractice case was "governed by *Brooks*, not by *Feres*", i.e., that discharge status should be treated the same as furlough status for *Feres* doctrine purposes. (*Id.* at 112, 75 S.Ct. at 143, italics added.) In so holding, this Court emphasized that in each of the three cases comprising *Feres*, the injuries occurred "while the serviceman was on active duty and not on furlough . . . ." (*Id.* at 111, 75 S.Ct. at 142, emphasis added.)

Contrary to this Court's longstanding authority in *Brooks*, *Feres*, and *Brown*, both the district court and Ninth Circuit below treated Sgt. George's furlough status as a legal irrelevancy. The district court concluded that "[r]egardless of whether Sgt. George was on furlough or not, his status was active duty, and he was treated at the

military hospital "'solely by virtue of his status as a serviceman.'" (App., *infra*, 2d.) The Ninth Circuit did not even mention furlough at all. Instead, it concluded even if Sgt. George was "'off duty' and nearing retirement, he remained on active duty in the United States Army and had not been discharged." (App., *infra*, 1c.)

Even if we assume for purposes of this petition that Sgt. George was on "active duty" during his 20 day furlough, this fact would not be fatal to plaintiff's FTCA claim. Indeed, *Feres* itself drew the key distinction between soldiers "while on active duty and not on furlough . . . ." (340 U.S. at 138, 71 S.Ct. at 155, emphasis added.) Moreover, on other occasions, the Ninth Circuit has recognized that the mere fact that a soldier is on "active duty" is hardly determinative. (See, e.g., *Dreier v. United States*, 95 F.3d 1425 (9th Cir. 1996) ["active duty status of a serviceman who is off-duty at the time of the negligence

is only relevant insofar as it may indicate that the serviceman "was engaging in an activity that is related in some relevant way to his military duties."], emphasis added.) Here, of course, it is clear that Sgt. George was not engaging in an activity that was related to his military duties -- he sought treatment for an injury to his knee caused by slipping in the bathtub in his home while on furlough.

II. Contrary To This Court's Decision In *Brown*, The Ninth Circuit, Among Others, Has Concluded That The *Feres* Doctrine Automatically Bars Suit For Medical Malpractice Where A Service Member Is Treated At A Military Hospital.

In the present case the Ninth Circuit ignored the fact that Sgt. George was on furlough, and essentially

adopted the Government's simplistic argument that, irregardless of "whether [a serviceman] seeks medical care while on temporary duty, leave, liberty, pass or furlough", if he avails himself of a benefit of service, at a military facility" . . . "the activity is `incident to service'" for purposes of the *Feres* doctrine bar. (Brief for Appellee, p. 17.) Thus, the Ninth Circuit held: "[b]ecause he was treated at an army hospital solely by virtue of his status as a serviceman, his injuries were incident to military service" and thus barred by *Feres*. (See App., *infra*, 1c-d.) In reaching this conclusion, the Ninth Circuit purported to rely upon its earlier opinion in *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1995). Yet, *Persons* makes clear that if the soldier therein had been on furlough, rather than merely "off-duty", the inquiry would have been over and *Feres* would not have applied:

"[t]he relevant distinction, as the government

notes, runs between servicepersons who are on `active duty' and those who have been discharged or are on furlough, not between `off-duty' and `on-duty' servicepersons."

(Emphasis added.)

The present decision, unlike *Persons*, runs directly afoul of this Court's decision in *Brown*. There, this Court permitted the tort action even though, when the injury occurred, the injured soldier was enjoying the benefits of medical care at a military hospital "solely by virtue" of his military status (as a discharged serviceman). Nonetheless, receipt of the "benefit" of military medical care by virtue of Brown's status was not held to automatically trigger the *Feres* doctrine.

The present decision by the Ninth Circuit, like

opinions of other circuits,[4] has treated all military hospital cases as automatically triggering *Feres* immunity regardless of the service member's duty status. This treatment ignores the keystone of the *Feres*-mandated inquiry -- whether the injury was incurred "incident to service". (340 U.S. at 146, 71 S.Ct. at 159.)

III. This Case Underscores The Inequitable Results Of The *Feres* Doctrine And Affords This Court A Perfect Opportunity To Finally Repudiate That Doctrine.

This case affords this Court a new opportunity to

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[4] See, e.g., *Madsen v. U.S. Ex. Rel. U.S. Army Corps of Eng.*, 841 F.2d 1011 (10th Cir. 1987) [medical malpractice action barred where service member was treated while on terminal leave scheduled to run until day of his retirement]; *Applehaus v. United States*, 877 F.2d 309 (4th Cir. 1989 [medical malpractice action barred where service member was on excess leave pending review of court-martial sentence]; *Scheppan v. United States*, 810 F.2d 461 (4th Cir. 1987) [medical malpractice claim barred for elective surgery where public health service officer was on medical leave at the time of surgery].

affirm, clarify, or, as Justice Scalia forcefully advocated in *Johnson, supra*, 481 U.S. at 692-703, 107 S.Ct. at 2070-75 (Scalia J. dissenting), to do away with, the *Feres* doctrine. Indeed, no reasonable rationale for the doctrine can be served by precluding Mrs. George's suit here.

As Justice Scalia explained, the express language of the FTCA renders the United States liable to all persons, including servicemen.[5] (*Id.*) Elsewhere in the Act, Congress specifically considered the special needs of the military, i.e., § 2680(j), which bars tort claims "arising out of the combatant activities of the military . . .". Therefore, Justice Scalia reasoned "[t]here was no proper basis for

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[5] The FTCA renders the Government liable:

> "for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b).

[the Supreme Court] to supplement -- i.e., revise -- that congressional disposition." (481 U.S. 693, 107 S.Ct. 2070.)

In the *Feres* decision, however, this Court reasoned that a literal reading of the FTCA should not apply to injuries that "arise out of or are in the course of activity incident to service" (340 U.S. at 146, 71 S.Ct 159) for three reasons: "(1) the parallel private liability required by the FTCA was absent . . . . (2) Congress could not have intended that local tort law govern the `distinctly federal' relationship between the Government and enlisted personnel . . . . (3) Congress could not have intended to make FTCA suits available to servicemen who have already received veteran's benefits to compensate for injuries suffered incident to service . . . ." (481 U.S. at 694, 107 S.Ct. 2063, citing *Feres*, internal citations omitted.) This Court added a fourth rationale in *Brown*:

"Congress could have never intended to permit suits for service-related injuries because they would unduly interfere with military discipline." (481 U.S. at 694, 107 S.Ct. 2063, citing *Brown*.)

Justice Scalia explained how this Court rejected the first rationale back in 1957. (481 U.S. at 695, 107 S.Ct. at 2071, citing, *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct. 374, 376 (1957.) He noted the second rationale met a similar fate. (481 U.S. at 695, 107 S.Ct. at 2071, citing, *United States v. Shearer*, 473 U.S. 52, 58 n. 4, 105 S.Ct. 3039, 3043 n.4 (1985.) Likewise, he noted *Feres*' third rational was no longer controlling. (481 U.S. at 697, 107 S.Ct. at 2072, citing, *United States v. Shearer*, *supra*, 473 U.S. at 58 n. 4, 105 S.Ct. at 3043 n.4 (1985.)

This leaves only the fourth rationale -- whether a suit would unduly interfere with military discipline. Justice Scalia reasoned that this rationale did not need the

judicially-created *Feres* doctrine. Rather, it was adequately provided for by Congress in the express exceptions made part of the FTCA:[6]

Justice Scalia explained how the fourth rationale is illogical when applied in a situation where a civilian could sue, but a serviceman could not. In *Johnson*, five Justices voted to preclude Johnson's widow from suing the Government for wrongful death after Johnson's helicopter crashed into a mountain. Applying the fourth rationale, those justices reasoned that permitting suit would permit "civilian courts to examine military decisionmaking and thus influence military discipline." (481 U.S. at 700, 107 S.Ct. at 2074). Yet, as Justice Scalia pointed out, had

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[6] Such exceptions include claims based upon combat command decisions (28 U.S.C. § 2680(j); claims based upon performance of "discretionary" functions (§ 2680(a); claims arising in foreign countries (§ 2680(k); international torts (§ 2680(h); and claims based upon the execution of a statute or regulation (§ 2680(a). (481 U.S. at 699-700, 107 S.Ct 2074.)

Johnson's helicopter crashed into a civilian's home, suit would have been permitted, and a civilian court would have been able to fully penetrate the identical "military decisionmaking" which led to the crash. (*Id.*)

The same illogical result is presented here. Had Sgt. George been a civilian, rather than a serviceman on furlough when he was treated, there is no question that the Government would be legally accountable to his widow for the alleged medical malpractice. Such a suit, however, would not undercut military decisionmaking or military discipline. The argument that, because Sgt. George was a serviceman, the identical suit might adversely affect military discipline, makes no sense.

CONCLUSION

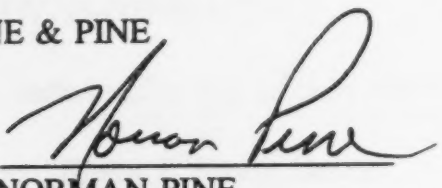
For all of the reasons described above, the petition for a writ of certiorari should be granted.

Dated: Oct 15, 1997

Respectfully submitted,

LAW OFFICES OF
ROBERT Q. HOOT

PINE & PINE

By 

NORMAN PINE
Attorneys for Petitioner
KATHERINE GEORGE

APPENDIX

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

- - - - - - - - - - -

No. 96-16406

CT/AG#: CV-95-00790-ACM

KATHERINE GEORGE, individually and as next friend & natural guardian of Michael, Karen & Kevin George, minors

Plaintiff - Appellant

v.

DEPARTMENT OF THE ARMY/NAF, United States of America

Defendant - Appellee

- - - - - - - - - - - -

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered July 20, 1997.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KATHERINE GEORGE,	)	No. 96-16406
individually and as next	)	D.C. No. CV-95-
friend & natural guardian of	)	00790-ACM
Michael, Karen & Kevin	)	
George, minors,	)	
Plaintiff-Appellant,	)	
v.	)	
DEPARTMENT OF THE	)	MEMORANDUM[1]
ARMY/NAF, United States	)	
of America,	)	
Defendant-Appellee	)	

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court

for the District of Arizona

Alfredo C. Marquez, District Judge, Presiding

Submitted June 17, 1997[2]

Before: GOODWIN, SCHROEDER, and TASHIMA, Circuit Judges.

Katherine George appeals from the district court's dismissal of her Federal Tort Claims Act ("FTCA") action for lack of subject matter jurisdiction under Feres v. United States, 340 U.S. 135 (1950). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

"The question of whether the Feres doctrine is applicable to facts reflected in the record of a case is a question of law reviewed de novo." Jackson v. United States, 110 F.3d 1484, 1486 (9th Cir. 1997) (citation

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[2] The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellant's request for oral argument is denied.

omitted).

The Feres doctrine bars FTCA claims brought against the United States if the plaintiff's injury arises out of activity incident to military service. See United States v. Johnson, 481 U.S. 681, 686 (1987). If a plaintiff alleges medical malpractice against a military hospital and had access to the medical services" solely by virtue of his status as a serviceman, "we have consistently found the injuries to be "incident to service." See, e.g., Persons v. United States, 925 F.2d 292, 296 (9th Cir. 1991) (citation omitted). "Feres bars suits for medical malpractice even when the treatment was not for military-related injuries." Jackson, 110 F.3d at 1489 (citations omitted).

George's decedent, Sergeant James George, was on permissive temporary duty when he was injured. Thus, even if he was "off duty" and nearing retirement, he remained on active duty in the United States Army and

had not been discharged. See Army Regulation 630-5; see also Henninger v. United States, 473 F.2d 814, 816 (9th Cir. 1973) (stating that "[h]owever close to discharge Henninger was at the time of his injury, he was still on active status, and may not bring this [medical malpractice] action."). Here, the complaint alleged that medical personnel at an army hospital committed malpractice in treating Sergeant George. Because he was treated at an army hospital solely by virtue of his status as a serviceman, his injurues were incident to military service. See Persons, 925 F.2d at 296.

Accordingly, the Feres doctrine bars George's action. See id.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

KATHERINE GEORGE,	)	
individually and	)	CIV 95-790
as next friend and natural	)	TUC ACM
guardian of Michael, Karen and	)	ORDER
Kevin George, minors,	)	
Plaintiffs.	)	
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendants	)	

Plaintiffs sue Defendants under the Federal Tort Claims Act (FTCA) for having caused the wrongful death of Sgt. James George, husband and father to Plaintiffs, by negligently administering his medical care. It is uncontested that Sgt. George was on Permissive Temporary Duty (TDY) to house and job hunt in anticipation of his

pending retirement. (Plaintiffs' Opposition to Motion to Dismiss (Ps' Opposition) at Exhibit A.) He injured his knee getting out of the bathtub at his home and was treated at Fort Bliss Military Hospital, Fort Huachuca, Arizona. Further details regarding Sgt. George's death are conspicuously missing from the Complaint and motion memoranda.

The FTCA waives judicial immunity for tortious conduct of any Government employee. 28 U.S.C. § 2674. The FTCA, on its face, does not exempt the military, but the judiciary has carved out an exception for "`injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" Persons v. United States, 925 F.2d 292, 294 (9th Cir. 1991) (quoting Feres v. United States, 340 U.S. 135, 146, 71 S.Ct. 153, 159 (1950)). The Government moves for dismissal under the Feres doctrine because the Government contends that Sgt.

George's injury arose incident to his military service.

Plaintiffs contend that Sgt. George's TDY status was the equivalent of a 20 day furlough. Plaintiffs argue that Sgt. George's fall in the tub and resulting death can not be characterized as "incident to service." Defendants point out that Sgt. George was on active duty. See Ps' Opposition at Exhibit B, Army Regulation 630-5, p.1 (effective date July 15, 1984) (section captioned "Applicability" stipulates that the regulation, which includes Chapter 12: Permissive Temporary Duty, applies to active duty personnel).[2] Defendants argue his injury occurred at the hospital and that his medical care was administered incident to his service in the military. Although from the parties briefs this appears to be the dispositive issue, the Court finds that either way, neither

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[2] The Court relies solely on this for its determination of Sgt. George's military status. Therefore, Plaintiffs' Motion to Strike evidentiary offerings made in Defendant's Reply are moot.

fact determines whether the Feres doctrine applies to bar Plaintiffs' suit. See Miller v. United States, 42 F.3d 297, 301, 303 (5th Cir. 1995) (exclusive focus on military duty status is too narrow; instead there is a continuum from actual active duty at one extreme to discharge at the other. "Active duty" is not necessarily synonymous with "incident to service" for purposes of Feres).

There are three rationales underlying the Feres doctrine: "`1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the government to liability based on the fortuity of the situs of the injury; 2) the availability if alternative compensation systems; and 3) the fear of damaging the military disciplinary structure. United States v. Johnson, 41 U.S. 681, 690-92, 107 S.Ct. 2063, 2069 (1987); Atkinson v. United States, 825 F.2d 202, 204 (9th Cir. 1987); Persons

v. United States, 925 F.2d 292, 294 (9th Cir. 1991). The doctrine has had a complex and sometimes confusing evolution,[3] but the overall trend has been an ever increasing expansion and broadening of the doctrine. Persons, 925 F.2d at 295; Estate of McAllister, 942 F.2d 1473, 1479 (9th Cir. 1991), cert. denied, 502 U.S. 1092, 112 S.Ct. 1146 (1992). "As a result, practically any suit that `implicates the military judgments and decisions,' [Johnson], 481 U.S. at 691, 107 S.Ct. at 2069, runs the risk of colliding with Feres." Id.

Feres progeny, focuses the inquiry on whether allowing an action to proceed will infringe upon the "military's command and disciplinary decisions with respect to its personnel." United States v. Shearer, 473

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[3] See McAllister, 942 F.2d 1473, 1477-1479 (9th Cir. 1991) for historical analysis; see also, McGowen v. Scoggins, 890 F.2d 128, 129-36 (9th Cir. 1989) for exhaustive analysis of the doctrine's evolution.

U.S. 52, 105 S.Ct. 3039 (1985), "`Feres seems best explained by the peculiar and special relationship of soldier to his superiors, the effects of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'" Id. at 3042 (quoting United States v. Muniz, 374 U.S. 150, 162 83 S.Ct. 1859, 1858 (1963) (quoting United States v. Brown, 348 U.S. 110, 112, 75 S.Ct. 141, 143 (1954)). In applying Feres, the Court must resort to comparing fact patterns, case by case. McAllister, 942 F.2d at 1477.

Here, just as in Atkinson[4] and Persons,[5] Plaintiffs'

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[4] Service woman sued treating physician for ignoring her complaints about medical complications during pregnancy which resulted in still birth of child, and emotional and physical injury to plaintiff.

[5] Wife and children sued military medical facility for wrongful death, alleging that doctors negligently failed to provide case and counseling to serviceman who was suicidal. Plaintiffs alleged the medical malpractice resulted in death of husband and father, and in emotional damage to wife and children. Plaintiffs also charged

claims collide with the Feres doctrine. Regardless of whether Sgt. George was on furlough or not, his status was active duty, and he was treated at the military hospital "'solely by virtue of his status as a serviceman.'" Id. at 296 (quoting Millang v. United States, 817 F.2d 533, 535 (9th Cir. 1987) (per curium), cert. denied, 485 U.S. 987, 108 S.Ct. 1290 (1988). Plaintiffs' claims of wrongful death, like the wrongful death claims of plaintiffs in Atkinson and Persons, charges a military facility with medical malpractice. As in those cases, the inequity of Feres applies and the Government is immune from any liability, no matter how grievous its conduct. See Grosinsky v. United States, 947 F.2d 417, 418 (9th Cir. 1991) (per curium) (suits for medical malpractice barred by Feres; suit against army surgeon for negligently performing

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medical malpractice in that doctors failed to warn the family of serviceman's suicidal tendency and failed to provide the family with grief counselling after father's death.

vasectomy dismissed for lack of subject matter jurisdiction); see also, Hata v. United States, 23 F.3d 230, 235 (9th Cir. 1994) (incident to service bar applies to claims for medical malpractice by service member on active duty who receives medical care "solely by virtue of status as a serviceman).

Claims by family members are barred as well. McAllister, 942 F.2d at 1474; Hata, 23 F.3d at 235; Grosinsky, 947 F.2d at 418.

The Court has little choice but to find the Government immune from suit and to dismiss this action for lack of subject jurisdiction.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED.

DATED this 17th day of June, 1996.

/ss_____
ALFREDO C. MARQUEZ
Senior U.S. District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

KATHERINE GEORGE, et al.,	)	
Plaintiffs,	)	JUDGMENT IN A
vs.	)	CIVIL CASE
UNITED STATES OF AMERICA,	)	Case No. CIV-95-
Defendants.	)	790-T-ACM

JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **DECISION BY COURT.** This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Defendant's Motion to Dismiss is granted.

Judgment is entered in favor of the defendants and

against the plaintiffs.

June 18, 1996 RICHARD H. WEARE
Date CLERK

/ss_____
(By) Renee Ludeke, Deputy Clerk

Copies to: HOYT, PINE, FIGLEY, ACM. J/B